

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.Appeal No. 254 of 2006.

Judgement reserved on: 10.9.2007

Date of decision: 8.10.2007.

Nirmal Singh & another Appellants

Vs.

State of H.P.

.... Respondent.

Coram

The Hon'ble Mr. Justice Kuldeep Singh, Judge.

Whether approved for reporting? Yes

For the Appellants : Mr. Javed Khan, Advocate.

For the Respondent : Mr. M.L. Chauhan, Addl. Advocate General.

Kuldeep Singh, Judge.

The appellants have assailed their conviction and sentence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'Act') and Section 417 read with Section 34 IPC recorded by learned Special Judge, Mandi on 12.7.2006 in Sessions Trial No.22/03. Both the appellants have been sentenced rigorous imprisonment for 8 years with fine of Rs.80,000/- each for the offence under Section 20 of the Act, in case of default in the payment of fine, appellants shall further undergo imprisonment for one year, rigorous imprisonment for one year with fine of Rs.1000/- for offence under Section 417 IPC, in case of default in the payment of fine, the

Whether the reporters of the local papers may be allowed to see the Judgment? Yes

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appellants shall further undergo imprisonment for one month. Both the sentences shall run concurrently with the benefit of Section 428 Cr.P.C.

2. The facts in brief are that PW-11 ASI Madan Lal, HC Ram Lal, PW-3 constable Sarwan Kumar, PW-1 constable Bodh Raj and PW-4 constable Inder Singh, driver Durga Dass were on patrolling duty and they put up Naka at Khotinala on 28.12.2002. Two persons from Kullu side came on a scooter having number plate PB-32-8219 on rear side of the scooter at about 3.30 p.m. and the scooter was stopped by the police. In the meantime a motorcycle came from Pandoh side with two persons PW-9 Daulat Ram and Yadwinder. The documents of motorcycle were checked, the documents of scooter were also checked and on enquiry the person who was driving the scooter disclosed his name Nirmal Singh and the pillion rider on scooter Chhinder Pal, but both could not produce documents of the scooter, they only produced pollution certificate along with photocopy of daily diary report of Police Station, Nawansehar about the missing of registration certification.

3. The police checked the dicky of the scooter but found nothing incriminating. PW-11 Madan Lal checked the stepney of the scooter and felt that there was no air in the stepney. PW-11 detached the stepney from the scooter, opened it and found tube of the stepney without air. PW-11 found charas which was wrapped in polythene in stick form. The contraband was weighed and it was found to be 1 Kg. Out of the recovered stuff two samples of 25

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grams each were taken and put in separate parcel which were sealed with seal impression "T". The remaining charas was also put in a parcel and sealed. PW-11 filled in NCB form Ex.PN-/1. The police took into possession sample parcel, bulk stuff, stepney, documents of scooter vide Memo Ex.PD. PW-11 prepared ruka Ex.PR which was sent through PW-1 Bodh Raj for registration of case, who handed over the same to PW-2 HC Kushal Kumar who at that time was posted as MHC, Police Aut. On the basis of rukka, FIR Ex.PG was registered and file was sent to PW-11 through PW-1 Bodh Raj. The statements of witnesses were recorded, the appellants were arrested and were supplied with the grounds of arrest vide Memo Ex.PE and Ex.PF.

4. The PW-11 after completion of the investigation took the case property i.e. two samples, bulk charas, stepney, seizure memo, specimen seal and deposited them with PW-2 Kushal Kumar. PW-11 Madan Lal at that time was officiating as SHO at Police Station Aut. PW-2 Kushal Kumar made entry in the Malkhana Register for having received the case property and documents from PW-11 Madan Lal. On 30.12.2002 PW-2 Kushal Kumar sent one parcel of sample, NCB form, search and seizure memo etc. through PW-3 Sarwan Kumar constable vide RC No.98/2002 to CTL Kandaghat who deposited the same there. PW-3 Sarwan Kumar took the receipt of having deposited the same at CTL Kandaghat and handed over the same to PW-2 Kushal Kumar.

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5. PW-11 Madan Lal prepared Special Report Ex.PO under Section 57 of the Act which was taken by PW-4 Inder Singh on 29.12.2002 for delivering to Superintendent of Police. PW-8 Prem Singh who was Assistant Reader to Superintendent of Police, Mandi received the same and made entry of Special Report in the register. As per Chemical Examiner Report Ex.PN the sample was found to be that of charas. The challan was filed in the Court. The appellants were charged under Section 20 of the Act and Section 417 read with Section 34 IPC and they pleaded not guilty. The prosecution examined 11 witnesses. The appellants were examined under Section 313 Cr.P.C., they pleaded their innocence. They, however, admitted that at the relevant time they were travelling on scooter No.PB-32-8219. They have examined one witness in their defence. The learned Special Judge convicted and sentenced the appellants as noticed above, hence this appeal.

6. I have heard the learned counsel for the appellants and learned Addl. Advocate General for the State. The learned counsel for the appellants has submitted that prosecution has failed to prove case beyond reasonable doubt, no charas was recovered from the appellants. The appellants were not having domain over the charas. There is violation of Sections 49, 50 of the Act. The appellants were not taken to the Gazetted officer nor any option was given to the appellants by the police at the time of search. There is violation of Section 57 of the Act. Independent witnesses of the area were not joined during search. The appellants have no connection with the

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charas. The learned Addl. Advocate General has supported the impugned judgment and has submitted that prosecution has proved the case against both the appellants beyond reasonable doubt.

7. PW-1 Bodh Raj has stated that he was posted as constable at Police Station Aut. On 28.12.2002 at about 3.30 p.m. he was present at Khotinala along with ASI Madan Lal, HC Ram Lal, Inder Singh and other police officials in connection with traffic checking. A scooter bearing No.PB-32-8219 came from Kullu side and Nirmal Singh present in the Court was driving the scooter and Chhinder Pal present in the Court was pillion rider. The police gave signal to the scooter and it was stopped. A motorcycle came from Pandoh side which was also stopped by the police. The motorcycle was being driven by Yadwinder Singh and Daulat Ram was the pillion rider. The documents of scooter were checked in presence of Daulat Ram and Yadwinder Singh. Nirmal Singh produced pollution certificate Ex.PA, daily diary report Ex.PB, Insurance cover Ex.PC. ASI Madan Lal checked dicky of the scooter but found nothing in the dicky. The stepney of the scooter was checked by ASI Madan Lal by giving fist blow. The stepney was detached from the scooter and its rim was also removed from the tyre, the police recovered charas lying in a polythene bag from the tyre of the stepney. The scale was brought by him from the shop of Tej Ram and on weightment the recovered stuff was found to be 1 Kg.. Thereafter two samples of 25 grams each were separated from bulk charas and sample parcels were sealed with seal 'T'. The remaining charas was also sealed

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with seal impression 'T'. The specimen seal was taken up separately on the piece of cloth. NCB form was filled in. After affixing seal impression the seal was handed over to Daulat Ram. The parcel of samples, stepney, remaining charas along with documents were taken into possession vide seizure Memo Ex.PD. Thereafter Investigating Officer prepared ruka and handed over to him which he carried to Police Station for registration of case. He handed over the ruka to MHC and after registration of the case, he brought back the case file on the spot. The Investigating Officer in his presence informed the appellants about the grounds of arrest vide memos Ex.PE and PF. The second sample is Ex.P1, parcel Ex.P-2, stepney Ex.P-3 and balance charas Ex.P-4. This witness was cross-examined at length on behalf of the appellants but nothing could be extracted from him favourable to defence. The cross-examination of this witness suggests that the appellants do not deny their presence and the checking of their scooter by the police at the relevant time. In fact suggestion has been given to this witness which has been denied by him that the police had the knowledge that some contraband article was lying inside the tyre.

8. PW-2 Kushal Kumar has stated that on 28.12.2002 he was posted MHC at Police Station Aut. PW-1 Bodh Ram brought ruka of ASI Madal Lal and on that basis he registered FIR Ex.PG which is in his hand and bears his signature. He sent the file to Investigating Officer through PW-1 Bodh Raj. At about 8.05 p.m. ASI Madan Lal officiating SHO on 28.12.2002 deposited with him two

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parcel samples of charas sealed with seal impression 'T', one parcel of remaining charas, stepney sealed with seal impression 'T', specimen seal, and NCB form, search and seizure memo etc. He made entry in Malkhana register and a copy of relevant extract of Malkhana register is Ex.PH. On 30.12.2002 he sent one parcel of sample along with request, NCB form, search, seizure memo, copy of FIR, specimen seal through constable Sarwan Kumar vide RC No.98/2002, Ex,PJ. The case property so long remained in his custody was not tampered by any one. On 29.12.2002 ASI Madan Lal handed over the Special report to him which was sent through constable Inder Singh to Superintendent of Police, Mandi.

9. PW-3 constable Sarwan Kumar has stated that on 30.12.2002, PW-2 MHC Kushal Kumar had handed over to him parcel of charas sample sealed with seal impression 'T' along with NCB form, request, copy of FIR, specimen seal etc. in an envelope, vide RC No.98/2002 and he deposited the same with CTL Kandaghat on 30.12.2002. Neither he nor he allowed any one to tamper with this parcel.

10. PW-4 Inder Singh constable has stated that on 28.12.2002 he was present at Khotinala along with ASI Madan Lal and other police officials in connection with traffic checking. He supported the statement of PW-1 Bodh Raj. He was cross-examined on behalf of the appellants but nothing could be extracted from him which can be used by appellants in defence.

11. PW-5 Harmesh Singh, clerk of DTO Nawanshehar has stated that as per record scooter No.PB-32-8219 bearing Chasis No.90082 Engine No.21427 Bajaj Chetak was registered on 29.3.1996 in the name of Surjit Singh and scooter has not been sold to any one else. He proved the abstract of entry Ex.PM.

12. PW-6 Surjit Singh has stated that he is the owner of scooter No.PB-32-8219, Chhasis No.90082, Engine No.21427 and he has not sold the scooter to any one. PW-7 SI Dabe Ram has stated that in 2003 he was posted as SI/SHO, Police Station, Aut. He has stated that after receipt of Chemical Examiner Report Ex.PN he prepared the challan.

13. PW-8 HHC Prem Singh has stated that in the year 2003 he was posted as Assistant Reader to Superintendent of Police, Mandi. On 29.12.2002 at about 4.50 p.m. he received Special Report Ex.PO of this case in the office of Superintendent of Police which was received by Superintendent of Police on 29.12.2002 through constable Inder Singh. He entered the Special Report in Special Report Register at serial No.9. The endorsement on the Special Report Ex.PO of the Superintendent of Police is Ex.PO/1. He also made endorsement on the Special Report which Ex.Ex.PO/2.

14. PW-9 Daulat Ram has stated that on 28.12.2002 at about 3.30.p.m. he was going on motorcycle of Yadwinder from Pandoh towards Hanogi as pillion rider. At Khotinala, police had already laid naka and on signal given by the police the motorcycle was stopped. They had shown the papers of the motorcycle to the

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police. In the meantime a scooter came from the Manali side which was also stopped by the police. There were two persons on the scooter. The police asked the scootrists to produce the documents who produced 2-3 documents. The police enquired the name of the scootrists who disclosed their names Nirmal and Chhinder. Nirmal was driving the scooter and the Chhinder Pal was the pillion rider and he identified both of them in the Court. The police checked the dicky of the scooter but found nothing incriminating. The police checked the stepney of the scooter and the same was found containing charas in polythene bag. The police weighed the same and found it to be 1 Kg. The police separated two samples and put them in cloth parcel and sealed with seal impression 'T', remaining charas was sealed in a separate parcel. Thereafter the stepney was also sealed with seal 'T'. The police prepared papers on the spot. The police also took specimen of seal 'T' on separate piece of cloth Ex.PP which bears his signatures and of Yadwinder and both the appellants. The seal after use was given to him. He has lost the seal and could not bring in the Court. The police took into possession the charas vide memo Ex.PD which bears his signature as well as Yadwinder Singh and both the appellants. The police took into possession pollution certificate Ex.PA, copy of rapat Ex.PB, Insurance cover Ex.PC of the scooter, sample parcel is Ex.P-1, parcel of stepney and charas is Ex.P-2, Stepney Ex.P-3, remaining charas Ex.P-4. This witness was cross-examined on behalf of the appellants but he deposed nothing in favour of the appellants.

15. PW-10 Tej Ram has stated that on 28.12.2002 at about 3.30 p.m. he gave scale and weights to one constable who after use returned the same to him after 20 minutes, PW-11 Madan Lal has supported the prosecution case in its entirety in his deposition. He was cross-examined by defence counsel. He was suggested that firstly they checked the scooter of appellants and witnesses came later on. He was given suggestion in routine that no charas was recovered from the appellants. The appellants in their statements under Section 313 Cr.P,C. have admitted that they were on scooter bearing No.PB-32-8219 at about 3.30 p.m. In defence the accused have produced DW-1 Karnail Singh who has stated that he knew Chhinder Pal present in the Court. The wife of Chhinder Pal is aunt (Bua) of Nirmal Singh. In the last week of December, 2002 he along with appellants and other persons came on scooter from Manikaran to take bath. On 28.12.2002 the appellants left Manikaran on scooter before him. At Aut police laid naka and vehicles were checked in routine manner. His scooter was formally checked . Both the appellants were also present there. The appellants had shown documents of the scooter to the police. The appellants had altercation with the police. The appellants were later on taken to police station but nothing else was done by the police.

16. The perusal of statements of PW-11 Madan Lal, PW-1 Bodh Raj, PW-4 Inder Singh, PW-9 Daulat Ram, proves that the scooter bearing No.PB-32-8219 was checked by the police and on checking 1 Kg. contraband was recovered which was concealed in

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the stepney of the scooter. The police took out two samples of 25 grams each, sealed the samples with seal impression 'T' and the balance contraband was also separately sealed with seal impression 'T'. NCB form was filled in, samples, stepney, remaining contraband along with documents were taken into possession vide seizure memo Ex.PD.

17. The learned counsel for the appellants has argued that no charas was recovered from the appellants and the prosecution has failed to prove the case against the appellants beyond reasonable doubt. He has advanced connected argument that independent witness of the area was not joined during search. The next argument of the learned counsel for the appellants is that there is non compliance of mandatory provision of Sections 49, 50 and 57 of the Act and therefore, according to him appellants are entitled to acquittal. He has also submitted that prosecution has failed to prove case against the appellants under Section 417 read with Section 34 IPC.

18. There is positive evidence on record that appellants were riding scooter No.PB-32-8219 and they were stopped at naka at Khotinala by the police at about 3.30 p.m. on 28.12.2002. The appellant No.1 was driving the scooter and appellant No.2 was pillion rider on the scooter. The appellants in their statements under Section 313 Cr.P.C. have admitted that they were riding scooter No.PB-32-8219. The cross-examination conducted on behalf of the appellants of the search, seizure and recovery witnesses also

indicates that appellants do not deny their presence at the time of search seizure and recovery of the contraband. DW-1 Karnail Singh has specifically stated that on 28.12.2002 the police had laid naka and both appellants were also present there and they had shown documents of the scooter to the police. This proves the presence of appellants at naka at Khotinala on 28.12.2002 at about 3.30 p.m.

19. Now the question is whether the prosecution has proved recovery of 1 Kg. charas from the conscious possession of appellants from the scooter. It is not the defence of any of the appellant that recovered stuff did not belong to him but it belonged to the other appellant. PW-1 Bodh Raj has stated that on 28.12.2002 at about 3.30 p.m. appellants were riding on scooter bearing No. PB-32-8219 which was stopped at naka. ASI Madan Lal checked the stepney of the scooter and recovered charas lying in a polythene bag from the tyre of the stepney. On weighment of the recovered stuff it was found 1 Kg.. Thereafter two samples of 25 grams each were separated from the bulk charas. The separate samples as well as bulk charas were sealed with seal 'T'. NCB form was filled in, the sample charas, stepney, bulk charas and documents were taken into possession vide recovery memo Ex.PD. The Investigating Officer prepared ruka and handed over to him for registration of the case. The Investigating Officer informed the appellants grounds of arrest vide memo Ex.PE and Ex.PF. He has proved second sample Ex.P-1, parcel of stepney Ex.P-2, stepney Ex.P-3 and bulk charas Ex.P-4.

20. PW-4 Inder Singh corroborated the statement of PW-1 Bodh Raj. PW-9 Dault Ram independent witness has corroborated the statement of PW-1 Bodh Raj and PW-4 Inder Singh regarding recovery of charas from the stepny of scooter. PW-11 ASI Madan Lal has supported the prosecution story. He has stated that he prepared ruka Ex.PR and sent the same to the Police Station, Aut through constable Bodh Raj for registration of the case. He took the accused, case property i.e. samples, remaining charas and deposited the same along with NCB form, specimen seal, copy of FIR etc. with MHC Kushal Kumar. He prepared Special Report Ex.PO on 29.12.2002.

21. PW-2 HC Kushal Kumar has proved that on 28.12.2002 at about 8.05 p.m. ASI Madan Lal officiating as SHO on that day deposited with him two parcels of samples of charas sealed with seal impression 'T', one parcel of remaining charas, stepney sealed with seal impression 'T', specimen seal, NCB form, search, seizure memo which he entered in Malkhana register Ex.PH. On 30.12.2002 he handed over parcel of sample and other documents to Sarwan Kumar. On 29.12.2002 ASI Madan Lal handed over Special Report to him which he sent through constable Inder Singh to Superintendent of Police, Mandi. PW-3 Sarwan Kumar has stated that on 30.12.2002 he received parcel sample and other documents from Kushal Kumar which he deposited with CTL Kandaghat on 30.12.2002. The report of CTL Kandaghat is Ex.PN which proves that the sample contained the contents of charas. The prosecution has thus proved complete

chain from search, seizure, recovery of the contraband and ultimately report of Chemical Examiner that the recovered stuff was containing charas.

22. The learned counsel for the appellants has submitted that the recovery of the contraband is not witnessed by independent witness. PW-9 is an independent witness who was present on the spot as he was riding motorcycle on that date along with Yadwinder and they were stopped by police at same naka at about 3.30 p.m. on 28.12.2002. It is not the case of the appellants that the police witnesses and PW-9 Daulat Ram are inimical towards them. The appellants have failed to make out any case why testimonies of police witnesses and PW-9 Daulat Ram should not be believed. The learned Special Judge has properly appreciated the material on record and has come to the conclusion that 1 Kg. contraband was recovered from the conscious possession of the appellants from the stepney of the scooter at about 3.30. p.m. on 28.12.2002 when the police checked the scooter.

23. The learned counsel for the appellants has submitted that there is violation of Sections 49,50 and 57 of the Act and therefore, even if It is established that some offending stuff was recovered from the stepney of the scooter at the time of checking on 28.12.2002 in that case also in view of violation of Sections 49,50 and 57 of the Act, the appellants are entitled to acquittal. The Section 49 of the Act gives power to any officer authorized under section 42, if he has reason to suspect that any animal or conveyance is, or is

about to be, used for the transport of any narcotic drug or psychotropic substance or controlled substance, in respect of which he suspects that any provision of this Act has been, or is being, or is about to be, contravened at any time, stop such animal or conveyance, or, in the case of an aircraft, compel it to land. In the case in hand the scooter was not checked by the police party on the basis of prior information that the scooter was being used for carrying or transporting contraband. The scooter was checked in routine during naka. In the facts of the present case, there is no violation of Section 49 which otherwise empowers the authorized officer to check the vehicles.

24. As far as Section 50 is concerned, the appellants have failed to point out from the evidence on record that the police party before checking the scooter was having prior information that the scooter was being used for carrying charas. The scooter was checked in routine manner at naka. It has come on record that on that date and time the police checked many vehicles in routine. PW-9 Daulat Ram who was riding motorcycle along with Yadwinder was also stopped at the naka and was checked. DW-1 Karnail Singh has stated that on 28.12.2002 at naka the police had checked the vehicles in routine manner and his scooter was also searched by the police. It is thus clear that the police was not having prior information regarding the contraband recovered from the appellants and the checking was done by the police in routine manner.

Therefore, appellants have failed to make out any case of violation of Section 50 of the Act.

25. The prosecution has proved on record Special Report Ex.PO which was prepared on 29.12.2002. This report was delivered to Superintendent of Police, Mandi on 29.12.2002 as per PW-8 Prem Singh. The appellants have failed to point out that the Special Report was not sent to superior officer by the Investigating Officer as per Act. The prosecution has proved the case against the appellants beyond reasonable doubt. The learned Special Judge has rightly appreciated the material on record and no fault can be found with the conclusion drawn by learned Special Judge from the material on record. To be fair to the learned counsel for the appellants he has cited judgment dated 6.7.2007 in **Cr. A. No.254 of 2004, titled Ajay Kumar and another vs. State of Himachal Pradesh** passed by a Division Bench of this Court. The facts in Ajay Kumar case are entirely different and therefore, judgment dated 6.7.2007 in Ajay Kumar case supra is not applicable in the facts of the present case.

26. The learned counsel for the appellants has also assailed the conviction of the appellants under Section 417 read with Section 34 IPC. PW-5 Harmesh Singh has stated that as per record of District Transport Office, Nawanshehar scooter No.PB-32-8219 is registered in the name of Surjit Singh. PW-6 Surjit Singh has stated that he is still owner of scooter bearing No.PB-32-8219. It has been proved on record that appellants were riding scooter by putting

fictitious number plate PB-32-8219 on the rear of scooter when it was checked at naka on 28.12.2002 at about 3.30 p.m. It is thus clear that prosecution has proved the case against the appellants under Section 417 read with Section 34 IPC also and the learned Special Judge has drawn correct inference from the material on record. The learned Special Judge has rightly appreciated the material on record, the appellants have failed to point out any legal defect in the impugned judgment whereby they have been convicted under Section 20 of the Act, Section 417 read with Section 34 IPC.

27. In ***Dharam Pal vs. State of H.P and Vidya Sagar vs. State of H.P. Latest HLJ 2007 (HP) 827***, 1 kilo 600 grams contraband was recovered and on analysis of representative sample of the stuff Chemical Examiner found that the stuff contained only 28.92% charas. The trial Court in that case convicted both the accused under Section 20 of the Act and sentenced them to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/- each and in default of payment of fine to undergo simple imprisonment for further period of two years each. A Division Bench of this Court in ***Dharam Pal*** supra upheld the conviction of both the accused in that case but substituted the sentence to 5 years rigorous imprisonment and fine of Rs.20,000/- and in default of payment of fine simple imprisonment for further period of 6 months, in view of the fact that the quantity of the charas recovered from them was lesser than commercial quantity. In the present case the quantity of recovered contraband is 1 Kg. and as per Chemical Examiner report Ex.PN the

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quantity of resin in the representative sample was 28.26%, therefore, applying the ratio of ***Dharam Pal*** supra the quantity of charas in the present case comes to less than commercial quantity, hence conviction of the appellants for offence under Section 20 of the Act as well as under Section 417 read with Section 34 IPC is maintained, however, sentence of each appellant is substituted under Section 20 of the Act to 5 years rigorous imprisonment and fine of Rs.20,000/- and in default of payment of fine further simple imprisonment for 6 months, each appellant shall further undergo rigorous imprisonment of one year with fine of Rs.1000/- for offence under Section 417 IPC, in default of payment of fine further simple imprisonment for one month. Both the sentences shall run concurrently with the benefit of Section 428 Cr.P.C. The appeal is accordingly disposed of.

(Kuldip Singh)
Judge.

October 8, 2007
(sks)